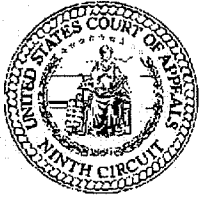


A-11 (rev. 7/00)

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USCA DOCKET # (IF KNOWN)

09-35699

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
CIVIL APPEALS DOCKETING STATEMENT**

PLEASE ATTACH ADDITIONAL PAGES IF NECESSARY.

<b>TITLE IN FULL:</b> Dianne L. Kelley, Kenneth Hansen, Jim Walters, Matt Morales, Russell Hall and Don Schroder, Plaintiffs-Appellants, v. Microsoft Corporation, a Washington corporation, Defendant-Respondent.	<table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td colspan="2">DISTRICT: W.D. Wash. JUDGE: Pechman</td> </tr> <tr> <td colspan="2">DISTRICT COURT NUMBER: C07-0475MJP</td> </tr> <tr> <td>DATE NOTICE OF APPEAL FILED: TBD</td> <td>IS THIS A CROSS-APPEAL? <input type="checkbox"/> YES</td> </tr> <tr> <td colspan="2">IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY): 08-80030, 09-80070</td> </tr> </table>	DISTRICT: W.D. Wash. JUDGE: Pechman		DISTRICT COURT NUMBER: C07-0475MJP		DATE NOTICE OF APPEAL FILED: TBD	IS THIS A CROSS-APPEAL? <input type="checkbox"/> YES	IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY): 08-80030, 09-80070	
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IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY): 08-80030, 09-80070									
<b>BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:</b> Plaintiffs assert that defendant violated the Washington Consumer Protection Act and was unjustly enriched by certifying PCs as "Vista Capable" when such PCs could only run Windows Vista Home Basic, and by dropping its WDDM requirement to facilitate the dumping of millions of soon-to-be obsolete so-called "Vista Capable" PCs on unsuspecting consumers.									
<b>PRINCIPAL ISSUES PROPOSED TO BE RAISED ON APPEAL:</b> Whether the district court erred in declining to certify the action as a class action.									
<b>PLEASE IDENTIFY ANY OTHER LEGAL PROCEEDING THAT MAY HAVE A BEARING ON THIS CASE (INCLUDE PENDING DISTRICT COURT POSTJUDGMENT MOTIONS):</b> Schnall v. AT&T Wireless, 139 Wn. App. 280, 161 P.3d 395 (2007), review granted, 163 Wn.2d 1022, 185 P.3d 1194 (2008), pending in the Washington Supreme Court, may address relevant proximate cause issues.									
<b>DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:</b> <input type="checkbox"/> Possibility of settlement <input checked="" type="checkbox"/> Likelihood that intervening precedent will control outcome of appeal <input type="checkbox"/> Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (Specify) _____ <input type="checkbox"/> Any other information relevant to the inclusion of this case in the Mediation Program _____ <div style="text-align: right;"><input type="checkbox"/></div>									
Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges									
<b>LOWER COURT INFORMATION</b>									


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JURISDICTION		DISTRICT COURT DISPOSITION	
FEDERAL	APPELLATE	TYPE OF JUDGMENT/ORDER APPEALED	RELIEF
<input type="checkbox"/> FEDERAL QUESTION <input checked="" type="checkbox"/> DIVERSITY <input type="checkbox"/> OTHER (SPECIFY):	<input type="checkbox"/> FINAL DECISION OF DISTRICT COURT <input type="checkbox"/> INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT <input type="checkbox"/> INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY): <input checked="" type="checkbox"/> OTHER (SPECIFY): Appeal pursuant to Fed. R. Civ. Pro. 23(f)	<input type="checkbox"/> DEFAULT JUDGMENT <input type="checkbox"/> DISMISSAL/JURISDICTION <input type="checkbox"/> DISMISSAL/MERITS <input type="checkbox"/> SUMMARY JUDGMENT <input type="checkbox"/> JUDGMENT/COURT DECISION <input type="checkbox"/> JUDGMENT/JURY VERDICT <input type="checkbox"/> DECLARATORY JUDGMENT <input type="checkbox"/> JUDGMENT AS A MATTER OF LAW <input checked="" type="checkbox"/> OTHER (SPECIFY): Order denying class certification	<input type="checkbox"/> DAMAGES: SOUGHT \$ _____ AWARDED \$ _____ <input type="checkbox"/> INJUNCTIONS: <input type="checkbox"/> PRELIMINARY <input type="checkbox"/> PERMANENT <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED <input type="checkbox"/> ATTORNEY FEES: SOUGHT \$ _____ AWARDED \$ _____ <input type="checkbox"/> PENDING <input type="checkbox"/> COSTS: \$ _____

**CERTIFICATION OF COUNSEL****I CERTIFY THAT:**

1. COPIES OF ORDER/JUDGMENT APPEALED FROM ARE ATTACHED.
2. A CURRENT SERVICE LIST OR REPRESENTATION STATEMENT WITH TELEPHONE AND FAX NUMBERS IS ATTACHED (SEE 9TH CIR. RULE 3-2).
3. A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SERVED IN COMPLIANCE WITH FRAP 25.
4. I UNDERSTAND THAT FAILURE TO COMPLY WITH THESE FILING REQUIREMENTS MAY RESULT IN SANCTIONS, INCLUDING DISMISSAL OF THIS APPEAL.

  
 \_\_\_\_\_  
 Signature

7/30/09  
 \_\_\_\_\_  
 Date

**COUNSEL WHO COMPLETED THIS FORM**

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**\*THIS DOCUMENT SHOULD BE FILED IN THE DISTRICT COURT WITH THE NOTICE OF APPEAL\***  
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The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DIANNE KELLEY, et al.,	)	Case No. C07-0475MJP
	)	
Plaintiffs,	)	ORDER DENYING PLAINTIFFS'
v.	)	MOTION FOR NARROWED
	)	CLASS CERTIFICATION
MICROSOFT CORPORATION, a Washington	)	
corporation,	)	
	)	
Defendant.	)	
	)	
	)	

This matter comes before the Court on Plaintiffs' motion for narrowed class certification. (Dkt. No. 319.) The Court has considered the motion, the response (Dkt. No. 326), the reply (Dkt. No. 330), and all other pertinent documents in the record. The Court has also considered the parties' presentations at oral argument on March 25, 2009. For the reasons set forth below, the Court DENIES Plaintiffs' motion for narrowed class certification.

**Background**

Plaintiffs challenge various aspects of Microsoft's marketing of its Windows Vista ("Vista") operating system. (Dkt. No. 139, Third Amended Compl. [hereinafter "Compl."] ¶ 1.2.) In early 2006, nearly a year before releasing Vista, Microsoft authorized original

1 equipment manufacturers ("OEMs") to place a sticker on personal computers ("PCs")  
2 indicating they were "Windows Vista Capable" ("WVC" or "Vista Capable") PCs. (Compl.  
3 ¶ 4.3.) At the time, OEMs sold computers with the Windows XP operating system. Plaintiffs  
4 allege that a large number of PCs labeled WVC can only operate "Windows Home Basic"  
5 ("Basic"), which lacks certain core features of Vista. Plaintiffs further challenge Microsoft's  
6 "Express Upgrade Guarantee Program," which allowed customers purchasing WVC PCs to  
7 upgrade from Windows XP to Vista for little to no cost. (Compl. ¶ 4.5.)  
8

9 Microsoft released four versions of Vista: Basic, Premium, Business, and Ultimate.  
10 Plaintiffs purchased computers that had "Vista Capable" labels, but did not have "Premium  
11 Ready" labels. Vista Capable PCs that did not have the Premium Ready designation could, in  
12 general, only run Basic. Plaintiffs allege that Basic cannot fairly be called "The Real Vista."  
13 (Compl. ¶ 4.4.) Defendant responds that Basic provides customers with a number of benefits  
14 over XP and is a part of the Vista line. (*Id.* at 7-8; Dkt. No. 292 at 5.) Moreover, Defendant  
15 points to its own marketing materials and argues that the distinctions between levels of Vista  
16 were made clear throughout the Vista Capable campaign. (Dkt. No. 253 at 9-10; Tindall  
17 Decl., Exs. B, C, D.)  
18

19 Plaintiffs initially asserted four causes of action; however, they voluntarily dismissed  
20 their breach of contract claim and the Court dismissed their Magnusson-Moss Warranty Act  
21 Claim. (*See* Dkt. Nos. 29, 39.) Plaintiffs moved for class certification on their remaining  
22 two causes of action: (1) a claim under Washington Consumer Protection Act ("CPA") or  
23 other state consumer protection acts and (2) a claim for unjust enrichment. (Dkt. No. 65.) On  
24 February 22, 2008, after determining that Washington law applied to the dispute, this Court  
25 certified a class comprised of:  
26  
27

1 All persons and entities residing in the United States who purchased a personal  
2 computer certified by Microsoft as "Windows Vista Capable" and not also  
3 bearing the "Premium Ready" designation.

4 Excluded from this class are: (a) Defendant, any entity in which defendant has  
5 a controlling interest or which has a controlling interest in defendant; (b)  
6 Defendant's employees, agents, predecessors, successors or assigns; and (c) the  
7 judge and staff to whom this case is assigned, and any member of the judge's  
8 immediate family.

9 Kelley v. Microsoft Corp., 251 F.R.D. 544, 560 (W.D. Wash. 2008).

10 The Washington Supreme Court's decision in Indoor Billboard/Wash., Inc. v Integra  
11 Telecom of Wash., Inc., 162 Wn.2d 59 (2007), informed this Court's analysis of  
12 predominance for the purposes of Plaintiffs' CPA claim. In Indoor Billboard, the court held,  
13 in cases involving an affirmative misrepresentation of fact, a plaintiff must show that the  
14 defendant's misrepresentation proximately caused plaintiff's injury. 162 Wn.2d at 83-84 ("A  
15 plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff  
16 would not have suffered an injury."). While the Court agreed with Defendant that a  
17 deception-based theory of causation would require the trier of fact to determine whether  
18 individual class members were actually deceived, the Court found that common issues could  
19 predominate with an alternative theory of causation. Id. at 558. The Court allowed the class  
20 to proceed under a "price inflation" theory of causation where Plaintiffs would demonstrate a  
21 CPA violation by showing:

22 Microsoft artificially inflated demand for computers only capable of running  
23 Vista Home Basic, causing Plaintiffs to pay more for those PCs than they  
24 would have without the 'Windows Vista Capable' campaign.

25 Id. Similarly, the Court ruled that "Plaintiffs may maintain an unjust enrichment claim on the  
26 theory that Microsoft's marketing campaign artificially inflated the demand for and price of  
27 'Windows Vista Capable' PCs." Id. at 559 (further noting that common issues predominated

1 as to whether Defendant retained a benefit, whether Defendant knew of that benefit, and  
2 whether Plaintiffs paid more than they should have for WVC PCs).

3 After the parties concluded discovery and exchanged expert reports, Defendant moved  
4 for decertification and summary judgment arguing Plaintiffs had failed to develop their price  
5 inflation theory. (Dkt. No. 252 at 1.) The Court granted the motion for decertification  
6 because Plaintiffs failed to identify any demand or price effects attributable to the "Vista  
7 Capable" designation. (Dkt. No. 316 at 10-14.) Plaintiffs' expert, Dr. Keith Leffler,  
8 determined he could not numerically calculate the number of individuals "who would not  
9 have bought a Vista Capable but not Premium Ready [computer] but for the program."  
10 (Rummage Decl., Ex. I. at 30:24-25, 31:1-3.) Instead, without attempting a regression-type  
11 analysis, Dr. Leffler drew his conclusions from testimonial evidence. (See Leffler Decl.) The  
12 Court reasoned that Plaintiffs' anecdotal evidence of price inflation could not demonstrate  
13 that Vista Capable was a cause which "in direct sequence" produced Plaintiffs' injury. (Dkt.  
14 No. 316 at 8 (quoting Wash. Pattern Jury Instruction ("WPI") 310.07).) Without evidence of  
15 class-wide price inflation, Plaintiffs could not demonstrate that common questions  
16 predominated for the purposes of their CPA claim. (Id. at 14.) Similarly, the Court found that  
17 common issues did not predominate for Plaintiffs' unjust enrichment claim because Dr.  
18 Leffler did not isolate the benefit Microsoft retained as a result of the Vista Capable program.  
19 (Id. at 15.) In light of the Court's Order decertifying the class, Plaintiffs have filed a motion  
20 to certify two narrowed classes that purportedly cure the deficiencies of the initial class.  
21  
22  
23

24 First, Plaintiffs ask the Court to certify an "Express Upgrade Guarantee" class of  
25 individuals who purchased a Vista Capable computer and participated in the Express Upgrade  
26  
27

1 Program.<sup>1</sup> The Express Upgrade Program allowed purchasers of Vista Capable PCs to  
2 receive an upgrade to Vista when Microsoft released the new operating system. (See Dkt. No.  
3 220 at 3.) Plaintiffs complain that, because these consumers were only able to upgrade to  
4 Basic, they did not receive the “real” Vista. The Court previously observed that the Express  
5 Upgrade group may suffer a different injury than individuals who purchased a Vista Capable  
6 PC without participating in the program. See Kelley, 251 F.R.D. at 555 (“The ‘Express  
7 Upgrade’ program participants’ injury is correlated to the amount spent on the cost of the  
8 upgrade program, not the allegedly inflated price of the ‘Windows Vista Capable’ PCs.”).  
9 Plaintiffs claim participation in the program “is common, class-wide evidence that each class  
10 member intended to purchase a PC that had the capability to run Vista,” which would satisfy  
11 Indoor Billboard’s proximate cause requirement. (Dkt. No. 319 at 4.)

13 Second, Plaintiffs urge the Court to certify a “WDDM” class of individuals who  
14 purchased Vista Capable computers lacking the capability to run the Windows Device Driver  
15 Model (“WDDM”) graphics driver.<sup>2</sup> (Dkt. No. 319 at 10.) The driver is a software program  
16 that allows an operating system, such as XP or Vista, to communicate with the computer’s  
17 graphics processing unit. (Wallent Decl. ¶ 4.) Microsoft initially instructed OEMs that Vista  
18 Capable computers would have to support WDDM, but it later dropped the requirement.  
19 (Birk Decl., Ex. A at MS-KELL 51052; 99307.) The Court recently denied Plaintiffs’ motion  
20

21  
22 <sup>1</sup> Plaintiffs propose the following Express Upgrade class: “All persons and entities residing in the  
23 United States who: (a) purchased a personal computer certified by Microsoft as ‘Windows Vista  
24 Capable;’ (b) participated in Microsoft’s Express Upgrade Guarantee program to Windows Vista; and  
25 (c) received a software upgrade to Windows Vista Home Basic.” (Dkt. No. 319 at 9.)

26 <sup>2</sup> Plaintiffs propose the following WDDM class: “All persons and entities residing in the United States  
27 who purchased a personal computer that was certified by Microsoft as ‘Windows Vista Capable,’ but  
lacked the ability to support Microsoft’s Windows Device Driver Model (“WDDM”).” (Dkt. No. 319  
at 10.)



1 for partial summary judgment declining to rule as a matter of law that Microsoft's decision to  
2 drop the WDDM requirement was an "unfair or deceptive act" under the CPA. (Dkt. No.  
3 339.) Plaintiffs claim non-WDDM compatible computers lack the ability to run all the  
4 features in Basic. (Dkt. No. 319 at 5 ("Their Vista Home Basic was not even the 'real' Vista  
5 Home Basic.")) Plaintiffs characterize the WDDM requirement shift as a series of material  
6 omissions which, unlike affirmative misrepresentations, do not need to fulfill Indoor  
7 Billboard's proximate cause requirement.

### 8 Discussion

9  
10 Class certification is governed by Federal Rule of Civil Procedure 23. The party  
11 seeking class certification bears the burden of demonstrating that he or she has met all for  
12 requirements in Rule 23(a) and at least one of the requirements of Rule 23(b). Zinser v.  
13 Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001). To satisfy subsection (a),  
14 Plaintiffs must show (1) the class is so numerous that joinder of all members is impracticable,  
15 (2) there are questions of law or fact common to the class, (3) the claims or defenses of the  
16 representative parties are typical of the claims or defenses of the class, and (4) the  
17 representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ.  
18 P. 23(a). Plaintiffs assert they satisfy Rule 23(b)(3), which requires the Court to find:  
19  
20 questions of law or fact common to class members predominate over any  
21 questions affecting only individual members, and that a class action is superior  
22 to other available methods for fairly and efficiently adjudicating the  
controversy.

23 Fed. R. Civ. P. 23(b)(3) (further listing factors relevant to the inquiry). For the purposes of  
24 this motion, the parties focus on the predominance requirement of Fed. R. Civ. P. 23(b)(3).  
25 (See Dkt. No. 319 at 14; Dkt. No. 326 at 13.)  
26  
27



I. Timeliness

As a preliminary matter, Defendant argues the Court should not reach the merits of Plaintiffs' motion because it is untimely. (Dkt. No. 326 at 7-8.) While the question of certification must normally be settled "[a]t an early practicable time after a person sues," the Court is free to amend an order granting or denying certification at any time before final judgment. Fed. R. Civ. P. 23(c)(1)(A)-(C). Defendant urges the Court to deny Plaintiffs' motion as a prudential matter because Plaintiffs have not pointed to any new factual developments justifying reconsideration. (Dkt. No. 326 at 7.) The Court finds that its decision to decertify the class (Dkt. No. 316) is a unique development that justifies consideration of alternative class certification.

II. Predominance

The parties appear to agree that the certification question turns on the predominance requirement of Rule 23(b)(3). Rule 23(b)(3) classes must demonstrate that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." The Ninth Circuit has explained: "[i]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate." Zinser, 253 F.3d at 1189 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1778 (2d ed. 1986) (hereinafter "Wright, Miller & Kane, Federal Prac. & Proc.")). There is no single "qualitative or quantitative test" for predominance; rather, the Court pursues a "pragmatic" inquiry as to whether "common questions represent a significant aspect of the case." 7AA Wright, Miller & Kane, Federal Prac. & Proc. § 1778 (3d ed. 2005) (collecting cases).

Though the parties do not address the substantive elements of Plaintiffs' claims in

1 their most recent round of briefs, the Court must, of course, analyze the issue of  
2 predominance in the context of Plaintiffs' burden. See Castano v. American Tobacco Co., 84  
3 F.3d 734, 744 (5th Cir. 1996) (a court must be aware of the "applicable substantive law" in  
4 determining predominance). After setting out the elements of each claim, the Court will turn  
5 to the issue of predominance for each proposed class.

6 a. Washington's Consumer Protection Act

7 To prevail on a CPA claim, a plaintiff must show: (1) the defendant engaged in an  
8 unfair or deceptive act; (2) the act occurred in the conduct of defendant's trade; (3) the  
9 practice affected the public interest; (4) plaintiff was injured; and (5) the defendant's act or  
10 practice was the proximate cause of plaintiff's injury. Hangman Ridge Training Stables, Inc.  
11 v. Safeco Title Ins. Co., 105 Wn.2d 778, 787-93 (1986); see also WPI 310.01. An act is  
12 "unfair or deceptive" if it "had the capacity to deceive a substantial portion of the public."  
13 Hangman Ridge, 105 Wn.2d at 785; see also WPI 310.08. For cases involving affirmative  
14 misrepresentations, a plaintiff "must establish that, but for the defendant's unfair or deceptive  
15 practice, the plaintiff would not have suffered an injury." Indoor Billboard, 162 Wn.2d at 84  
16 (adopting WPI 15.01).

17 b. Unjust Enrichment

18 To state a claim for unjust enrichment in Washington, a plaintiff must show: (1)  
19 plaintiff conferred a benefit upon defendant; (2) defendant had an "appreciation or  
20 knowledge" of the benefit; and (3) that retention of the benefit would be unjust under the  
21 circumstances. Ballie Commc'ns Ltd. v Trend Bus. Sys. Inc., 61 Wn. App. 151, 160 (1991).

22 Even though unjust enrichment does not require proof of causation, this Court observed:

23 [i]f the inequity is that Microsoft deceived consumers, the trier of fact will  
24 need to inquire whether Microsoft actually deceived consumers (an  
25

1 individualized inquiry) to determine whether any benefit conferred on  
2 Microsoft was unjust.

3 Kelley, 251 F.R.D. at 559.

4 c. Proposed Express Upgrade Class

5 Plaintiffs contend common questions predominate with respect to an “Express  
6 Upgrade” class because, merely by participating in the program, customers have demonstrated  
7 a “subjective desire to obtain Vista.” (Dkt. No. 319 at 14.) They argue that they can  
8 demonstrate actual reliance, which is sufficient to establish causation. (Id. (citing Schnall v.  
9 AT&T Wireless Services, Inc., 139 Wn. App. 280, 292 (2008).) Under their theory, common  
10 issues predominate by virtue of Plaintiffs’ upgrades alone. The Court disagrees.

11 First, Plaintiffs’ argument is misplaced because it conflates Plaintiffs’ decisions to  
12 upgrade their PCs with common evidence of causation. In Indoor Billboard, the Washington  
13 Supreme Court rejected plaintiffs’ argument that a payment of an invoice was “per se  
14 sufficient” to demonstrate a causal link between the defendant’s misrepresentations and the  
15 alleged injury. 162 Wn.2d at 83-84. Instead, the Court found that “payment of the invoice  
16 may be considered with all other relevant evidence on the issue of proximate cause.” Id. at  
17 84. As in Indoor Billboard, Plaintiffs’ decision to participate in the Express Upgrade program  
18 is relevant to the question of causation, but it is not the most important evidence on the issue.  
19 See 7AA Wright, Miller & Kane, Federal Prac. & Proc. § 1778 (“it is not sufficient that  
20 common questions merely exist, as is true for the purposes of Rule 23(a)(2) . . .”). As  
21 Defendant points out, a host of individualized questions exist regarding Plaintiffs’ personal  
22 knowledge about the Express Upgrade Program. (Dkt. No. 326 at 13-15 (analyzing the  
23 disclosures each of the named Plaintiffs received with respect to Express Upgrade).) Even if  
24 Plaintiffs all participated in the program to receive an upgrade, the individual Plaintiffs’  
25  
26  
27

1 different knowledge about the upgrade is the dominant inquiry. Plaintiffs who participated in  
2 the Express Upgrade Program knowing they would only upgrade to Vista Home Basic may  
3 not have suffered any injury at all.

4 Second, Plaintiffs' proposed Express Upgrade class suffers from the same flaws as its  
5 original deception-theory based Vista Capable class. Plaintiffs assert Microsoft deceived  
6 class members into purchasing a version of Vista that was not the "real Vista." (Dkt. No. 319  
7 at 14.) The Court found that Plaintiffs' original deception-based Vista class was defective:

8  
9 A deception-based theory of causation would necessarily require the trier of  
10 fact here to determine whether individual class members were actually  
11 deceived . . . a trier of fact would want to know (1) whether the consumer saw  
12 the "Windows Vista Capable" sticker; (2) whether the consumer was aware,  
13 through other education or advertising, of the differences between Home Basic  
14 and Vista Premium; **(3) whether the consumer only wanted Home Basic or**  
15 **was interested in a more sophisticated operating system;** and (4) whether  
16 the consumer's choice was predominately informed by price. **Because an**  
17 **individualized analysis is necessary to determine what role Microsoft's**  
18 **"Windows Vista Capable" marketing program played in each class**  
19 **members' purchasing decision,** individualized issues predominate and class  
20 treatment is inappropriate for a CPA claim utilizing a deception-based theory  
21 of causation.

22 Kelley, 251 F.R.D. at 558 (emphasis added). Plaintiffs have not demonstrated how this  
23 analysis fails to apply with equal force for the Express Upgrade class. As before, Plaintiffs'  
24 underlying claim is that they were deceived by the Vista marketing campaign. Because  
25 evidence relating to each Plaintiffs' consumer choice is not amenable to class-wide analysis,  
26 an Express Upgrade class is inappropriate. Likewise, common questions cannot predominate  
27 on Plaintiffs' unjust enrichment claim because the question of inequity turns on "whether  
Microsoft actually deceived consumers (an individualized inquiry)." Id. at 559.

Third, Plaintiffs' analogy to Klay v. Humana, 382 F.3d 1241 (11th Cir. 2004), is  
unpersuasive. In Klay, the Eleventh Circuit affirmed certification of a class of physicians

1 pursuing RICO claims against HMOs accused of underpaying for medical care provided. 382  
2 F.3d at 1246-47. Even though Plaintiffs were required to demonstrate individual reliance, the  
3 court found common issues predominated because “based on the nature of the  
4 misrepresentations at issue, the circumstantial evidence that can be used to show reliance is  
5 common to the whole class.” Id. at 1259. Unlike the plaintiffs in Klay, who were all  
6 motivated by a common purpose of being paid by the HMOs, Plaintiffs here may have been  
7 motivated by Microsoft’s representations or by the fact that an upgrade was bundled with  
8 their purchase. (See Dkt. No. 220 at 2-3.) Furthermore, the circumstantial evidence in Klay  
9 was sufficient because the physicians entered into a contract for services with the HMOs. 382  
10 F.3d at 1259. The relationship between Plaintiffs and Microsoft does not approach the depth  
11 necessary to support similar circumstantial evidence.  
12

13 Common issues do not predominate with respect to Plaintiffs’ proposed Express  
14 Upgrade class because the class suffers from the same defects as the original deception-theory  
15 class. For the purposes of a CPA claim, the predominant questions would relate to Plaintiffs’  
16 subjective understanding of the Express Upgrade program and their individual belief in  
17 Microsoft’s Vista advertising campaign. Such proof is not amenable to class-wide treatment.  
18 Similarly, the proposed class cannot assert an unjust enrichment claim because the trier of fact  
19 would have to determine whether Microsoft’s profit was inequitable in light of any actual  
20 individual deception.  
21

22 d. Proposed WDDM Class

23 Plaintiffs frame their WDDM claim as one that “primarily” alleges material omissions  
24  
25  
26  
27

1 of fact, rather than affirmative misrepresentations.<sup>3</sup> (Dkt. No. 319 at 15.) Indoor Billboard's  
 2 causation analysis does not apply to cases of material omissions. See 162 Wn.2d at 81  
 3 (distinguishing between "failure to disclose" cases and "affirmative misrepresentation" cases).  
 4 In consumer fraud cases alleging omissions of fact, courts have recognized that it is "virtually  
 5 impossible to prove reliance." Schnall, 139 Wn. App. at 291 (quoting Morris v. Int'l Yogurt  
 6 Co., 107 Wn.2d 314, 328 (1986)). Analogizing to securities cases where reliance may be  
 7 presumed upon proof that an omission is material, some courts have adopted a rebuttable  
 8 presumption of reliance in the consumer protection context. See Grays Harbor Adventist  
 9 Christian School v. Carrier Corp., 242 F.R.D. 568, 573 (W.D. Wash. 2007) (Leighton, J.)  
 10 (citing Binder v. Gillespie, 184 F.2d 1059, 1064 (9th Cir. 1999)). The presumption of  
 11 reliance shifts the focus from the plaintiffs' subjective knowledge to what a defendant  
 12 "allegedly concealed in light of what consumers reasonably expect." Id. at 573. Thus, under  
 13 Plaintiffs' theory, common issues predominate because the presumption of reliance creates an  
 14 objective inquiry. (Dkt. No. 330 at 9.)

16 In Schnall, a Washington Court of Appeals reversed a trial court's denial of class  
 17 certification where plaintiffs alleged AT&T failed to disclose the true nature of fees charged  
 18 for wireless service. 139 Wn. App. at 291-92. The Schnall court reasoned that, if plaintiffs  
 19 could only prove causation through reliance, "many meritorious cases could not be brought."  
 20

21  
 22 <sup>3</sup> There may be some tension between Plaintiffs' previous motion for summary judgment (Dkt. No.  
 23 163) and their current characterization of the WDDM class as one primarily involving omissions. In  
 24 their prior motion, Plaintiffs urged the Court to find Microsoft's actions related to WDDM were  
 25 deceptive or unfair within the scope of the CPA by analogizing to a number of cases involving  
 26 affirmative misrepresentations. (Dkt. No. 163 at 27 (citing Dwyer v. J.I. Kislak Mortgage Corp., 103  
 27 Wn. App. 542, 545-46 (2000); Griffith v. Centex Real Estate Corp., 93 Wn. App. 202, 214 (1998);  
Travis v. Wash. Horse Breeders Assoc., Inc., 111 Wn.2d 396, 406 (1988) (representations by the seller  
 that a horse was "one of the best yearlings in the state"))).

1 Id. at 291. The Schnall court never formally adopted a presumption of reliance; it merely held  
 2 that reliance was not the exclusive method of establishing causation.<sup>4</sup> Id. In Morris v. Int'l  
 3 Yogurt Co., the Washington Supreme Court adopted a rebuttable presumption of reliance in  
 4 an action under the Franchise Investment Protection Act where a plaintiff demonstrated  
 5 defendant's omissions were material. 107 Wn.2d 314, 40-41 (1986) (citing Affiliated Ute  
 6 Citizens of Utah v. United States, 406 U.S. 128, 153-54 (1972) (adopting a presumption of  
 7 reliance in Securities § 10b-5 material omission cases)). The Morris court reasoned: "a  
 8 plaintiff who was required to prove reliance would have to show that he believed the opposite  
 9 of the omitted fact, and this would be practically impossible to prove." Id. at 41 (citations  
 10 omitted); see also Blackie v. Barrack, 524 F.2d 891, 908 (9th Cir. 1975) (reliance requirement  
 11 in a 10b-5 securities case was "redundant [because] the same causal nexus can be adequately  
 12 established indirectly, by proof of materiality coupled with the common sense that a stock  
 13 purchaser does not ordinarily seek to purchase a loss in the form of artificially inflated  
 14 stock."). For the presumption to apply, Plaintiffs' claim must "primarily" involve omissions  
 15 and the omissions must be material. See Affiliated Ute Citizens, 408 U.S. at 153 ("Under the  
 16 circumstances of this case, involving primarily a failure to disclose . . . [a]ll that is necessary  
 17 is that the facts withheld be material . . .").

18  
 19  
 20 i. Does Plaintiffs' class "primarily" allege omissions?

21 The Court must determine whether Plaintiffs' allegations center on material omissions  
 22 or affirmative misrepresentations. See Grays Harbor, 242 F.R.D. at 573. There is a fine,  
 23

24 <sup>4</sup> Schnall relies heavily on Picket v. Holland America Line-Westours, Inc., 101 Wn. App. 901 (2000)  
 25 ("Picket I"). The Court recognizes that the Washington Supreme Court has cast doubt on Picket I's  
 26 reasoning. See Indoor Billboard, 162 Wn.2d at 81 ("[t]his court subsequently reversed . . . finding  
 27 Picket I's analysis of causation suspect. Although we agree the CPA is to be liberally construed,  
Picket I carries this construction too far.").



perhaps imperceptible, line between what constitutes an affirmative misstatement and a material omission. (See Dkt. No. 326 at 21.) In the securities context, courts have recognized that omissions and misrepresentations are not exclusive categories. Some appear to argue that it is a distinction without substance. In Binder, for instance, Judge Reinhardt noted that “it is equally difficult to establish reliance on a misrepresentation and on an omission.” See Binder, 184 F.3d at 1069 (Reinhardt, J., dissenting) (quoting Little v. First California Co., 532 F.2d 1302, 1304 n.4 (9th Cir. 1976) (“All misrepresentations are also nondisclosures, at least to the extent that there is a failure to disclose which facts in the representation are not true.”));<sup>5</sup> see also Jennifer Rust Murray, Comment, Proving Cause in Fact Under Washington’s Consumer Protection Act: The Case for a Rebuttable Presumption of Reliance, 80 Wash. L. Rev. 245, 246 (2005) (arguing that courts should apply a presumption of reliance in cases involving affirmative misrepresentations). Nevertheless, the weight of authority favors applying the presumption only in cases that primarily allege omissions. See Binder, 184 F.3d at 1064. In “mixed case” instances where plaintiffs complain of both omissions and misrepresentations,

<sup>5</sup> The Little court also offered the following insight:

There is a true dilemma presented in a case in which there has been a general representation from which material facts are omitted and there is no independent alternative ground, such as an “open market” situation, that justifies dispensing with a requirement that plaintiffs show individual reliance. On the one hand, if individual proof of reliance is required of plaintiffs who have in fact relied to their detriment, but whose claims are not large enough to support the costs of such proof, then these plaintiffs will go uncompensated. On the other hand, if proof of reliance is not required, defendants are forced either to compensate plaintiffs who have not relied and whose harm defendants did not cause or to attempt the difficult, and perhaps impossible, task of rebutting plaintiffs’ demonstration of causation by attempting to show no reliance. It is not clear to us that one horn of the dilemma is clearly preferable to the other. But in any event, we feel the conceptual problem should be explicitly recognized as one in which there is no completely just solution.

532 F.2d at 1304, n.4 (internal citations omitted); but see Martin H. Redish & Clifford W. Berlow, The Class Action as Political Theory, 85 Wash. U. L. Rev. 753, 811-12 (2007) (arguing that class treatment for certain types of nominal value classes creates the risk that a procedural rule, Rule 23, could trump substantive law).

1 courts have declined to abide by the presumption of reliance. See Poulos v. Caesars World,  
2 Inc., 379 F.3d 654, 666 (9th Cir. 2004) (civil RICO claims alleging a mix of omissions and  
3 misrepresentations were not entitled to a presumption).

4 In Grays Harbor, Judge Leighton certified a CPA class of purchasers of furnaces who  
5 alleged that the manufacturer concealed a known design defect. 242 F.R.D. at 573. Because  
6 the Grays Harbor allegations were “primarily” based on omissions, the court applied a  
7 presumption of reliance. Id. Plaintiffs analogize to Grays Harbor and argue that disclosure  
8 of the WDDM requirement was a material omission because Microsoft failed to tell  
9 purchasers that it had originally planned on requiring WDDM compatibility. (See Dkt. No.  
10 330 at 11.) Defendant asserts that, even if Microsoft’s failure to disclose WDDM is an  
11 omission, it is only an omission given the affirmative statement presented by the “Windows  
12 Vista Capable” sticker. (Dkt. No. 326 at 21.)

14 Plaintiffs’ characterization of their proposed class is instructive. They ask the Court to  
15 certify a class of individuals “who purchased a personal computer that was **certified by**  
16 **Microsoft** as ‘Windows Vista Capable,’ but lacked the ability to support” the WDDM driver.  
17 (Dkt. No. 319 at 10 (emphasis added).) Microsoft’s alleged omission arises only in the  
18 context of its decision to label certain PCs as “Vista Capable.” If Plaintiffs’ central complaint  
19 is that the computers were not truly “Vista Capable” because they could not operate the  
20 WDDM driver, then their complaint is essentially that the label was false. In other words, the  
21 crux of Plaintiffs’ allegation is the “Vista Capable” affirmative misrepresentation.  
22

23 Plaintiffs offer a laundry list of omissions related to WDDM in an attempt to  
24 demonstrate that this is case primarily about omissions. (Dkt. No. 330 at 8.) The Court  
25 believes the primacy issue cannot be decided simply by comparing the number of alleged  
26  
27

1 omissions to the number of alleged misrepresentations. An appropriate analysis must look to  
2 the “best” characterization of the claims. See Poulos, 379 F.3d at 666. Here, they all center  
3 on the claim that computers lacking WDDM compatibility cannot achieve full Vista Basic  
4 functionality. This is only potentially deceptive in the context of Microsoft’s “Vista  
5 Capable” label. Without the label, there is nothing deceptive or unfair about selling non-  
6 WDDM compatible computers. Because the fulcrum of Plaintiffs’ claim is the label and  
7 because the label is must accurately characterized as an affirmative representation, Plaintiffs  
8 case does not “primarily” allege omissions. See Binder, 184 F.3d at 1064. It would therefore  
9 be inappropriate to apply a rebuttable presumption of reliance.  
10

11 ii. Is WDDM a material requirement?

12 Even if the WDDM class could fairly be characterized as one “primarily” asserting  
13 omissions, Plaintiffs have not established that a failure to disclose the WDDM decision was a  
14 material omission. In securities cases, a plaintiff is only entitled to the presumption after it  
15 establishes the materiality of the omission. See 4 Thomas L. Hazen, Treatise on the Law of  
16 Securities Regulation § 12.10[4] (4th ed. 2009). The Court cannot presume that a computer’s  
17 inability to run the WDDM driver is a material concern for the entire proposed class.  
18

19 The problem can most accurately be described as a question of scope. Plaintiffs  
20 propose a class of individuals who purchased “Vista Capable” computers lacking WDDM  
21 compatibility without distinction between those who have actually upgraded to Vista and  
22 those who have not. (See Dkt. No. 326 at 16.) Those consumers who purchased Vista  
23 Capable PCs, but continue to run Windows XP have suffered no loss of functionality in the  
24 absence of WDDM capability. Computers running Windows XP run the XPDM model, not  
25 the WDDM driver. (Wallent Decl. ¶ 8.) Plaintiff Dianne Kelley, the only named party for the  
26  
27

1 proposed class, claims she has suffered harm identical to other class members: she purchased  
2 “a so-called ‘Vista Capable’ PC that lacked the material benefits of WDDM.” (Dkt. No. 319  
3 at 18.) There is no evidence in the record that she ever upgraded to Basic. Plaintiff Kelley’s  
4 loss related to WDDM can only be characterized as a hypothetical future loss if she ever  
5 chooses to upgrade. For those Plaintiffs, like Ms. Kelley, who did not upgrade, the WDDM  
6 requirement is simply immaterial.

7 Plaintiffs’ argument that common issues predominate for the proposed WDDM class  
8 rests entirely upon the presumption of reliance. (See Dkt. No. 319 at 15-16.) The  
9 presumption is inappropriate in this case because the WDDM class does not “primarily”  
10 allege omissions and because Plaintiffs have not demonstrated that WDDM was a material  
11 issue for the proposed class members. Plaintiffs cannot demonstrate predominance for their  
12 proposed CPA class because an individualized analysis is necessary to determine what role  
13 the various omissions and misstatements had in each member’s purchasing decision. See  
14 Kelley, 251 F.R.D. at 558. Likewise, individualized questions predominate on the unjust  
15 enrichment claim because any inequity depends on whether Microsoft actually deceived  
16 individual consumers.

### 19 III. Certification of Questions

20 After oral argument, Plaintiffs filed proposed questions the Court could certify to the  
21 Washington Supreme Court. (Dkt. No. 352 at 2.) The Court agrees with Defendant that it  
22 would be futile to ask the Washington Supreme Court whether the presumption applied in  
23 Affiliated Ute and its progeny would apply under Washington’s CPA. (Dkt. No. 353 at 2.)  
24 The Court has already determined that, even if the presumption should be applied in the CPA  
25 context, Plaintiffs could not rely on it because their WDDM claim does not “primarily” allege  
26  
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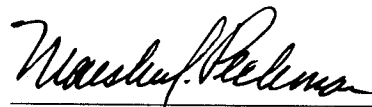
omissions. The Court declines to certify a question.

### Conclusion

The Court recognizes that Washington's CPA presents an odd dichotomy. On one hand, the Washington Supreme Court noted that "[c]lass actions are vital where the damage to any individual consumer is nominal," because "[w]ithout class actions, many meritorious claims would never be brought. Scott v. Cingular Wireless, 160 Wn.2d 843, 853 (2007); see also RCW 19.86.920 ("... this act shall be liberally construed that its beneficial purposes may be served.") On the other hand, Indoor Billboard's proximate causation requirement casts doubt on the ability of consumer plaintiffs to ever demonstrate class-wide causation. 162 Wn.2d at 83-84. Until the Washington Supreme Court speaks more precisely on the issue, this Court is bound by Indoor Billboard. Plaintiffs have failed to demonstrate how, under Indoor Billboard, either the Express Upgrade or WDDM class could satisfy the predominance requirement of Fed. R. Civ. P. 23(b)(3). Moreover, common issues do not predominate on the proposed classes' unjust enrichment claims. The Court therefore DENIES Plaintiffs' motion for narrowed certification. (Dkt. No. 319.) The parties are directed to meet and confer on whether they wish to reset a trial date for the remaining individual claims or if they wish to file for leave to appeal. The Court asks the parties to respond within ten (10) days of this Order.

The Clerk is directed to transmit a copy of this Order to all counsel of record.

Dated this 10th day of April, 2009.



Marsha J. Pechman  
United States District Judge

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DIANNE L. KELLEY, et al.,	)	
	)	
Plaintiffs,	)	No. C07-0475 MJP
	)	
v.	)	REPRESENTATION STATEMENT
	)	
MICROSOFT CORPORATION, a Washington	)	
Corporation,	)	
	)	
Defendant.	)	

Pursuant to Fed. R. App. 12(b) and Circuit Rule 3-2, counsel for the plaintiffs submit the following Representation Statement in connection with the plaintiffs' appeal of the above-referenced matter:

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REPRESENTATION STATEMENT  
(C07-0475 MJP) Page - 1

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 30, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following.

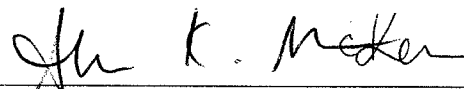
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